No. 15,236

IN THE

United States Court of Appeals

For the Ninth Circuit

BURTON E. CARR and
MARIE A. CARR,
Appellants,

vs.

CITY OF ANCHORAGE,
a corporation,
Appellee.

BRIEF OF APPELLANTS.

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Subject Index

Table of Authorities Cited

Rules

Statutes

Texts

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JURISDICTION.

The jurisdiction of the District Court was invoked and authorized under the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended 48 U. S. C. A., Section 101 and Section 53-1-1, 1949 Alaska Compiled Laws Annotated. The Circuit Court of Appeals has jurisdiction in this matter by virtue of the provisions of Section 1291, Chapter 92, of the Judiciary and Judicial Procedure Act, 28 U. S. C. A., June 25, 1948, c. 646, 62 Stat. 912, also, Section 8C of the Act of February 13, 1925, as amended. (28 U. S. C. A. 1294.) Practice in the district Court for the district of Alaska and appeals from the judgments rendered in

said Courts are all governed by the Federal Rules of Civil Procedure by virtue of 63 Stat. 445, 48 U. S. C. A. 103A.

STATEMENT OF FACTS.

This action was commenced by filing a complaint in the District Court for the District of Alaska, Third Division. (See Tr. 3.) The complaint filed alleged that the City of Anchorage is a municipal corporation, organized and existing under and by virtue of the laws of the Territory of Alaska and of the United States of America.

It alleged that on or about the 15th day of May, 1950, these plaintiffs owned a piece of property located at the corner of Fifth Avenue and Denali Streets, with the legal description of:

> Lot One (1), Block Twenty (20), East Addition to the City of Anchorage, Alaska, according to the recorded plat thereof;

then alleged that, on the 15th day of May 1950, the defendant City of Anchorage, through its duly elected, qualified and acting council, while in a regular meeting thereof, unanimously promised these plaintiffs that if they would cut the foundation off on a building they were commencing to build and move the building back, they would pay the cost of cutting off the foundation and building it back further on the lot, so that the City could take ten feet of the front of said lot by condemnation for the purpose of widening the street and for sidewalk purposes.

Then plaintiffs alleged that they believed the council of said City of Anchorage, agreed with the said City of Anchorage that they would cut their foundation off in front and extend it at the back, and, relying thereon, did cut the foundation off in front, and did build back from the front twelve feet further.

Then plaintiffs alleged that the city became obligated and bound to pay for the cutting off of said foundation, and the extra work required to do so, to the extent of $4,051.48, the amount being based upon an estimate furnished by Victor Gottberg, a builder who cut off the foundation, and rebuilt it back, and was paid therefor $4,051.48, by the plaintiffs.

Then the complaint alleged that the defendant City of Anchorage failed, neglected and refused to pay said sum or any part thereof, and that the defendant is justly indebted to the plaintiffs in the sum of $4,051.48, together with interest thereon at the rate of six per cent (6%) per annum from the 1st day of August 1950, at the time the account became due and payable; and the prayer followed for that relief.

Then on March 5, 1956, a motion to dismiss was filed by the City of Anchorage, and on April 12, 1956, an answer was filed in which certain admissions were made and certain denials (Tr. 7), and four affirmative defenses were alleged:

1. The contract alleged in plaintiffs' complaint is beyond the scope of the powers of the defendant.

2. That the agreement was not entered into as provided by Section 105, Chapter II of the Anchorage General Code.

3. Is based upon the contention of the City Attorney that there was no minutes of the council meeting, as required by Section 16-1-63, ACLA, 1949.

4. That there is no record in the minutes of the meetings of the City Council of any vote by any vote by said council, as provided in Section 16-1-40, ACLA, 1949.

and prayed that the plaintiffs recover nothing.

To this answer was filed a motion to strike. (Tr. 10.) Wherein the plaintiffs moved to strike the 2nd, 3rd and 4th separate affirmative defenses, for the reason that they were surplusage, prejudicial, and the allegations therein state no defense to the plaintiffs' cause of action and supported the motion by a memorandum. (Tr. 10.) This motion was filed on April 18, 1956.

Then a motion for summary judgment was filed by the defendant (Tr. 11 and 12), relying upon Rule 56 b and c of the Federal Rules of Civil Procedure. In support of this motion, an affidavit of Ben W. Boeke was filed, in which he stated that he was the City Clerk of the City of Anchorage and had held the position for nine years; that the affidavit was submitted in support of defendant's motion for summary judgment and to show that there is in this action no genuine issue as to any material fact, and that the defendant is entitled to a judgment as a matter of law, and that he was more than twenty-one years of age and competent to be a witness in this case; that he was the keeper of the records of the city council meetings, and that, after a diligent search, he was

unable to find records in any of the minutes of the city council meetings whereby the city council has agreed to pay the plaintiffs as alleged in their complaint, and that there is no record where the mayor or the city manager ever signed an agreement to pay as alleged in plaintiffs' complaint, nor any record that the city clerk has attested any document which obligates the city to pay as set forth in plaintiffs' complaint in this cause, nor any record showing the approval of this agreement as to substance by the city manager, and approved as to form by the city attorney, and that he has been unable to find any record where the city council voted to obligate the city to pay money to the plaintiffs as stated in the plaintiffs' cause. This was filed April 19, 1956.

Then, on the 20th of April, objection to motion for summary judgment was filed by the plaintiffs herein. (See Tr. 14.) This objection was supported by two affidavits—one of Burton E. Carr, that he very well remembered the day in the council meeting, when the matter involved in this lawsuit was discussed; that Mr. Boeke was present and the mayor and council were present, and that the senior Mr. Cuddy (who is now deceased) was there representing this plaintiff, and that a full and complete understanding was arrived at, and this was on or about the 15th day of May, 1950; that the council and city officials wanted this plaintiff to cut off the front part of his basement and build his building back ten feet; that the cost of doing this was discussed while the city council was duly assembled; then the city, acting through the

council and mayor in this discussion, agreed that the plaintiff was to cut off his foundation and move it back, and the city would pay the costs of moving it back, and the figure of $2,542.00, the estimate of the contractor Victor Gottberg, was discussed. It is further stated in the affidavit that the actual cost of cutting it off and moving it back was $4,051.48. The agreement was clear and unambiguous that the city would pay these plaintiffs the costs of cutting this basement off, due to the fact that the city wanted to extend the width of Fifth Avenue in front of this property. He then stated that it was the duty of Mr. Boeke to handle the records and it was no part of the affiant's duty to see that any record was made of the meeting and agreements.

Then there was an additional affidavit of a man by the name of Donald Roselle, stating that he was a *member of the city council in the month of May, 1950, was present as a councilman at a meeting* in which Burton E. Carr and his attorney, Warren Cuddy, appeared before the council, and a discussion took place whereby the city wanted to have Burton E. Carr set his building that was then ready for construction back further South of the line, so that Fifth Avenue could be widened; that the foundation for the building was then constructed and was too close to the street to allow for the widening that the city was then in the process of doing; that after considerable discussion, it was agreed that if the plaintiffs Burton E. Carr and his wife would cut the foundation off in front and set it back ten feet, the city would pay the cost of his

moving the foundation back that far; that he understood that a bid was going to be procured, and has since heard that it was procured; that it was the honest intention of the council at that time to pay Burton E. Carr the cost of moving his building back; that apparently the mayor and all of the council concurred. This was filed on April 30, 1956.

Then, on June 8, 1956, the Court entered oral judgment granting the summary judgment (Tr. 18); then a summary judgment was prepared by the Defendant City of Anchorage, produced, signed and filed in the case on the 16th day of July, 1956. (Tr. 18 and 19.)

Thereafter, and on the 16th day of July, 1956, a notice of appeal was filed in the case. Then, on the 17th day of August, 1956, specifications of error were filed, and on the 20th day of August, 1956, the clerk's certificate was filed (Tr. 21); then the transcript was duly filed in the United States Court of Appeals, Ninth Circuit, on August 22, 1956. (Tr. 22.)

A careful checking of the docket in the trial Court discloses that there was no ruling ever made on the motion to strike from the answer (Tr. 10), or the motion to dismiss (Tr. 5); that an answer was filed on April 12, 1956, and the motion to strike was directed against the answer, but no ruling was ever made by the Court on either of those motions so far as the minutes and dockets disclose (the original file now being in the appellate Court.) The specifications of error are very short and directly to the point here involved:

"The Court erred in granting the motion for summary judgment, which was filed July 16, 1956, for the reason that the complaint and supporting affidavits did state a cause of action in favor of the Plaintiffs and against the Defendant City of Anchorage, a municipal corporation." (Tr. 20.)

Our brief in the matter will be directed specifically to the specifications of error set out above.

ARGUMENT AND AUTHORITIES.

The city attorney relied upon a city ordinance for the right to have summary judgment granted. This city ordinance is Section 105.1 of Article II of the Anchorage General Code of Ordinances, and is, in words and figures, as follows:

"Section 105. Execution of Legal Documents.

105.1 All legal documents requiring the assent of the City shall be (1) approved by the City Council, (2) signed by the Mayor or City Manager on behalf of the City, (3) attested to thereon by the City Clerk, (4) approved thereon as to substance by the City Manager, and (5) approved thereon as to form by the City Attorney, unless otherwise provided by Territorial law, or a City ordinance."

This same Article II, on pages 17 and 18, is in part as follows:

"201.1. Powers. All legislative powers of the city and the determination of policy shall be vested in the Council. The Council shall have the powers conferred upon it by the laws of the Territory of Alaska, (as generally set out in Title 16, Chap. 1.,

Sec. 35, ACLA '49, as amended), the future State of Alaska, and as more particularly described in this Code."

"Without limitation of the foregoing the Council shall have power to:

"1. Take necessary action to protect and preserve the lives, the health, the safety and the well-being of the people of the city. (16-1-35 17th ACLA '49.)"

"2. Provide for fire protection, public health, police protection and the relief of the destitute and indigent. (16-1-35 6th ACLA '49.)"

"3. Provide rules and by-laws for council proceedings. (16-1-35 1st ACLA '49.)"

"5. Provide *streets,* alleys, *sidewalks,* sewers, wharves, etc. (16-1-35 3rd ACLA '49.)"

"20. Acquire and sell property with election and ratification sometimes required. (16-1-35 20th ACLA '49.)"

"26. Incur indebtedness for public works under limitations. (16-5-1 et seq. ACLA '49 and various Congressional Acts.)"

"31. Levy special assessments for public works sidewalks, snow removal after petition by property owners. (16-1-31 et seq. ACLA '49.)"

"41. To regulate the use of city streets by motor vehicles. (50-4-5 ACLA '49.)" (Emphasis ours.)

Then the general statutes of the Territory of Alaska authorize municipal corporations to do certain things and grants certain powers to them, in addition to the inherent powers to do all things necessary in carrying out the purposes for which it was formed, and we es-

pecially call your attention to 56-2-1 and 56-2-2, Alaska Compiled Laws, Annotated 1949, which read as follows:

> "§56-2-1. Actions by public corporations: Causes. An action may be maintained by any incorporated town, school district, or other public corporation of like character in the Territory in its corporate name, and upon a cause of action accruing to it in its corporated character, and not otherwise, in either of the following cases:
>
> First. Upon a contract made with such public corporation;
>
> Second. Upon a liability prescribed by law in favor of such public corporations;
>
> Third. To recover a penalty or forfeiture given to such public corporation;
>
> Fourth. To recover damages for an injury to the corporate rights or property of such public corporation. (CLA 1913, §1165; CLA 1933, §3816.)
>
> §56-2-2. Actions against public corporations. An action may be maintained against any of the public corporations in the Territory mentioned in the last preceding section in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such public corporation. (CLA 1913, §1166; CLA 1933, §3817.)"

The District Court of Alaska, in an opinion in *Nome v. Lange,* 1 Alaska 593, Judge Wickersham passed on a part of this above quoted section of the Alaskan statutes; while it is not directly in point, we thought it fair to call the Court's attention to it.

Section 56-4-1 ACLA did away with the writ of *Scire Facias* and the writ of *Quo Warranto,* but provided an adequate remedy for recovery.

Then Section 16-1-35 granted to the council certain powers, a few of which are as follows:

> To adopt rules and by-laws for their own proceedings; to provide for the location, construction and maintenance of the necessary *streets,* alleys, crossings, *sidewalks,* sewers, wharves, aqueducts, dikes and watercourses, and to widen, straighten or change the channel for streams and watercourses; to purchase, construct, or otherwise acquire, establish and operate public wharves, public cold-storage plants, telephone systems and plants for the use, sale and distribution of light, water, power, heat and telephone service; (and on Page 192) to acquire lands and sites; (on Page 193) to provide for fire protection, public health, police protection and the relief of the destitute and indigent; (on Page 195) to take such other action by ordinance, resolution *OR OTHERWISE,* as may be necessary to protect and preserve the lives, health, safety and *well-being* of the people of the city; (on Page 196) to acquire by purchase or otherwise, and to hold, real estate and other property and any interest therein; provided for a city planning commission; building regulations; zoning ordinances; provided "the Council shall constitute a board of adjustment hereunder, with the Mayor as ex-officio chairman, and may, in appropriate cases, and subject to the appropriate conditions and safeguards, make special exceptions to the terms of the ordinances and regulations adopted"; (Emphasis ours.)

and many other powers are granted by this section.

Then this honorable Court, in construing those powers, along with the general inherent powers, held, in the case of *Femmer v. City of Juneau,* et al., (97 Fed. 2nd 652) as follows:

> ' "Ordinarily the local corporation is permitted to enter into all contracts which are proper and necessary to enable it to perform the functions expressly conferred and *those which are necessarily implied from the powers conferred* * * *. The power to make contracts may result (a) from the inherent power of a municipality to perform indispensable acts, (b) from express words in a statute or the charter, or (c) *from what is implied as an incident to the powers expressly conferred on the municipality by a statute or the charter.*
>
> "* * * in order to exercise these (express) powers the municipality of course must make appropriate contracts; and it may be stated as a general rule that where there is no *charter* or *statutory restriction* a municipality may make any contract necessary to enable it to carry out the particular powers expressly conferred. 'A corporation authorized to do an act has, in respect to it, the power to make all contracts that natural persons could make.' * * *" ' (Emphasis ours.)

The honorable trial Court, in our opinion, erred in that he held that the only way the city could become liable in a contract was provided for under Section 105.1 above set forth. We argue then, and continue to argue, that a careful examination of this section shows, that it does not require that anything be done in any particular form, except that *legal documents*

requiring the assent of the city are required to be executed as this particular paragraph required. This paragraph does not state, and does not infer, that all contracts must be performed this way, nor that any particular action of the city council must be ratified or approved in accordance with this particular paragraph.

It would require extreme distortion to find the paragraph in question was meant to apply to all acts of the city council, and it is impossible and unreasonable, in our opinion, to give such effect to the particular wording of this section. For an example the defendant City of Anchorage filed a motion to dismiss in this case; it also filed a motion for summary judgment; it filed an answer; none of these instruments were executed by anyone except by Lynn W. Kirkland, the city attorney, and it is, to us, impossible to conceive that all legal activities of the city, and all regular contracts and agreements, have to be done as contended for by the defendant City of Anchorage in this case. The documents, as pleaded and last above referred to, do not show that they were approved by the city council, were signed by the mayor or city manager, attested to by the city clerk, nor approved in substance by the city manager. This also applies to the hundreds of contracts of purchase, and especially the contracts of employment entered into by the city in good faith and carried out. There is no reason why this agreement between the plaintiffs, who are the appellants here, and the defendant, who is the appellee here, acted upon, and entered into, in the

very best of faith, should not be carried out the same as any other agreement made by the City of Anchorage with any other individual. There is no question but what the city council and the mayor had the authority to make the agreement; the execution of the agreement is not denied; the affidavit of Ben Boeke, city clerk, amounts to a negative pregnant, in which he denies certain little things, but does not deny that the agreement was actually made, and the complaint of the plaintiffs, and the affidavits filed, to meet the requirement of the Federal Rules of Civil Procedure, show specifically that it was made, and even a Councilman made an affidavit that it was actually made and in good faith, with the intention of carrying it out. (Tr. 16.) This affidavit states that the city wanted Burton E. Carr to set his building, that was then ready for construction, back further South of the street line, so that Fifth Avenue could be widened, and states further that the foundation for the building was then constructed, and was too close to allow for the widening that the city was then in the process of doing. He then states it was agreed that if Burton E. Carr and his wife would cut the foundation off in front, and set it back ten feet, that the city would pay the costs of moving his foundation back that far; that the mayor and council all concurred. This statement is supported by the affidavit of Burton E. Carr, one of the plaintiffs in the matter, (Tr. 15) and he stated that he did cut off his foundation, did set it back, and paid therefor the sum of four thousand fifty-one dollars and forty-eight cents ($4,051.48), and no one attempts to even doubt or dispute these facts, but the

trial judge granted a summary judgment, directly against all of the facts, based solely upon this ordinance, which, to us, clearly is an ordinance regulating legal documents of conveyance, and does not apply to common contracts of the city.

McQuillin, Municipal Corporations, Second Edition, Revised, Volume VI, Paragraph 2652, Liability On Contracts, reads as follows:

> "#2652 (2488). Liability on contracts. A municipal corporation is bound by, and may sue and be sued on, all contracts which it may legally enter into in like manner as a private corporation or an individual. The immunity of government from liability on contracts has never been regarded as applicable to these local governmental organs. Even when acting as representatives of the sovereign state they are held liable. Accordingly they are liable to actions of implied assumpsit. Thus, where a municipality appropriates and uses the property of another, an obligation to pay for its use is implied which may be enforced by action.
>
> "And municipal corporations, having received money or property under contracts so far beyond their powers as not to be capable of being enforced or sued on, according to their terms, have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they have received. Thus, where a city was sued for damages for putting an end to a contract with the plaintiffs, for the improvement of its sidewalks, the only invalid part of which was its promise to pay in bonds, which it was beyond its power to issue, it was decided that the invalidity of that promise

was no reason why the city should not pay for the benefits which it had received from the plaintiff's performance of the contract. 'It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is ultra vires it would be sanctioning rank injustice to hold that payment need not be made at all.'

"The proposition that a city cannot incur liabilities otherwise than by ordinance 'in its full extent *is not tenable.* Under some circumstances a municipal corporation may *become liable by implication.* The obligation to do justice rests *equally upon it as upon an individual.* It cannot avail itself of the property or labor of a party and screen itself from responsibility under the plea that it never passed an ordinance on the subject. *As against individuals, the law implies a a promise to pay in such cases, and the implication extends equally against corporations. This is as well established by the authorities as any principle of law can be . . . A corporate act* is not essential in all cases to fasten a liability, and if it were necessary the law would sometimes presume, in order to uphold fair dealings and prevent gross injustice, the existence of such acts, and estop the corporation from denying it. Where the contract is executory, the corporation cannot be held bound unless the contract is made in pursuance of the provisions of its charter, *but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it.'*

This subject and the doctrine of municipal liability on ultra vires and unauthorized contracts are

fully considered in an earlier chapter." (Emphasis ours.)

A case that is directly in point with the case at bar is *Hitchcock v. Galveston,* 96 U. S. Reports, commencing on page 340. That action was based upon a contract between the City of Galveston and Hitchcock to do certain sidewalk improvements, and the contractor was to be paid in bonds, and it was later determined that the City of Galveston was not empowered to issue the bonds, and therefore refused to comply with the contract on the theory that the contract was ultra vires, and could not be enforced. The Honorable Justice Strong, in delivering the opinion for the United States Supreme Court, quoting from page 350, states:

". . . It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful."

This case is directly in point with the case at bar; even if the city exceeded its authority, acting by and through its mayor and council in meeting duly assembled, made this agreement in good faith, which must be conceded, as the good faith thereof is not denied, then the city received the benefit of the agreement, and cannot be heard to deny the duty to pay the costs of cutting this foundation off and moving it back, because such an interpretation would be encouraging the city in a fraudulent contention. To allow a city to pass an ordinance like the one pleaded above, 105.1, and then hide behind it to defeat justice, would deny all equitable and legal principles that we have so well recognized over the years, and the interpretation placed upon it by the trial Court, if allowed to stand, would give the city that advantage.

Another case so directly in point is *Arkansas Valley Compress and Warehouse Company v. Morgan, et al.,* 229 S.W. (2d) 133, and, due to the fact that this decision is very long, we are contenting ourselves to quote from some of the syllabuses as follows:

> "8. Municipal corporations 226
>
> A city entering into contracts involving, not government of its citizens, but only convenience, pleasure and profit of city and its people, acts in 'proprietary capacity'."
>
> "10. Municipal corporations 226
>
> A city making contracts in its proprietary capacity is bound thereby as any private corporation or citizen would be."

"11. Municipal corporations 1

Powers granted municipality for private advantages must be regarded as exercised by municipality as private corporation, though public may also derive benefit therefrom."

"12. Municipal corporations 1

Municipal corporations, in their private character as owners and occupiers of property, are regarded as individuals."

"13. Municipal corporations 1, 221

A municipal corporation, in its purely business, as distinguished from governmental, relations, is governed by same rules and held to same standards of just dealing prescribed by law for private individuals or corporations and is clothed with same full measure of authority over its property."

This case clearly illustrates the fallacy of allowing a municipal corporation, acting in its business capacity, to defeat justice by technical defenses.

Another case along a somewhat similar point is *Vito v. Town of Simsbury,* 87 Atlantic 722, wherein the headnote reads as follows:

"In the absence of statutory objection, a town may become liable on an implied contract for the reasonable worth of a permanent improvement constructed under an imperfectly executed contract, and retained by the town as part of the highway."

Since the defendant herein has accepted the benefits of the agreement between plaintiff and the city here, the doctrine of estoppel should now apply. For

the correct rule on this point, see McQuillin on Municipal Corporations, Volume 10 at page 416, Section 29.103:

> "It has been said that the 'doctrine of estoppel is predicated upon common honesty, and municipalities as well as individuals are affected by it', so that, although some courts limit the application of the doctrine to exceptional cases, it is generally held that a municipal corporation may be concluded by an estoppel in Pais like a natural person. The rule is limited to contracts within their powers, and 'as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principles and under the same circumstances as natural persons.' Stated in another way, when a city enters into a contract, or becomes obligated to another by operation of law, within its municipal powers, the doctrine of estoppel obtains against it with the same force and effect as against an individual, and hence it cannot deny the binding force and effect of such contract or obligation. Conversely, a litigant who has enjoyed and retained benefits of a contract with a municipal corporation may, in a proper case, be estopped to question the validity of the contract."

For cases in support of this doctrine, see *Getz v. City of Harvey,* 118 Fed. (2d) 817, wherein it is stated at page 827:

> "Commenting more sharply upon the attempt of the city to plead invalidity in the face of its enjoyment of the benefits of its acts, the court add that: 'No charge of fraud, combination or oppression is made. Every act seems to have been

fairly done and in pursuance of law. The disreputable feature of the case is, that the same authority doing all these acts, and whose city has received the benefits of them, now seeks to repudiate them. There is no rule of law, equity, justice or morals compelling this, and we cannot sanction it.'"

Also see *Quarles v. City of Appleton*, 299 Fed. 508, at page 516, where it is stated:

"The doctrine of estoppel is predicated upon common honesty, and municipalities as well as individuals are affected by it. No better statement of this rule can be found than that appearing in Eau Claire Dell's Improvement Company v. Eau Claire, 172 Wis. 240, 179 N.W. 2, where the court said 'it is now well settled that, as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principals and under the same circumstances as natural persons.'"

For further cases on this question of estoppel, see: *City of Jefferson v. Holder*, 24 S.E. (2d) 187; *City of East Point v. Upchurch Packing Company*, 200 S.E. 210; *City of Chetopa v. Board of County Commissioners of Labette County*, 143 Pac. (2d) 194; *Bousack and Pearce v. School District*, 49 S.W. (2d) 1085; *Lucier v. Manchester*, 117 Atlantic 286; *Amazeen v. New Castle*, 81 Atlantic 1079; *Independent Paving Company v. Bay St. Louis*, 74 Fed. (2d) 961, 964; *Adams v. Ziegler*, 70 Pac. 537; *Branigar v. Riverdale*, 72 N.E. (2d) 201; *Hinkle v. City of West Monroe*, 200 So. 468; *Mentz v. Mamou*, 116 So. 561; *Gautreau v.*

Mayor & City Council of Baltimore, 35 Atlantic (2d) 128; *Schueler v. Kirkwood*, 177 S.W. 760; *Morearity v. McCook*, 219 N.W. 829; *City of San Antonio v. Guadalupe-Blanco River Authority*, 191 S.W. (2d) 118, 125; *Wilson v. King's Lake Drainage & Levee Dist.*, 165 S.W. 734; *Baxter v. Village of Manchester*, 28 N.E. (2d) 672.

Also in connection with this particular point, see McQuillin on Municipal Corporations, Volume 10, footnote at page 416, as follows:

> "Respecting ultra vires doctrine, generally corporations, no less than actual persons, are held to contracts which are free from charges of fraud, collusion, or evident error. Whitesburg v. Whitesburg Water Co., 257 Ky. 444, 78 S.W. (2d) 330, 333, 334.
>
> Where the municipality advertised for bids for sewer pipe and awarded a contract thereon, it could not, after laying the pipe, defend against an action for the price *on the ground that the contract was not drawn as required by statute.* Carey v. East Saginaw, 79 Mich. 73, 44 N.W. 168." (Emphasis ours.)

Estoppel should apply against the defendant here for the reason that the plaintiffs have changed their position, at the request and relying upon the promises of the defendant. The defendant should not be estopped from asserting its action in entering this contract is invalid, whether or not it was. It is the plaintiffs' position that the action was not invalid in the first place, since there is no particular form prescribed for the entering of contracts of this nature. As

pointed out earlier, a contract is not necessarily a legal document and hence, under the terms of Section 105 of Chapter II of the Anchorage General Code, and unless some particular method is set forth for the entering of such contracts, the contract here would be as valid as any contract. Even the statute of frauds would not be a problem.

It should also be pointed out that enabling legislation which gives the power to the council of the municipal corporation is contained in Section 16-1-35 ACLA (1949) and the amending session laws. Nowhere in the enabling legislation is there a requirement that all contracts must be executed by certain formalities. This section contains the powers that are granted by the Territory of Alaska to the cities *and the ordinances of the particular cities are merely directives to the local governing body and should never be used for the purpose of avoiding legitimate contracts of the city.*

A very important Oregon case is *Winklebleck v. City of Portland,* 31 Pac. (2d) 637. For the purpose of brevity, we will quote the 3rd syllabus, and say, without fear of successful contradiction, that this is the holding in the body of the opinion. Syllabus 3 reads as follows:

> "3. Municipal corporations 244 (2)
>
> Contract binding municipal corporation may be brought into existence by vote of municipal council."

It is not the fault of the plaintiffs if the defendants fail to keep a record in their meetings as required by

law, and there is an assumption that the city did keep minutes of this meeting. It would be presumed that they did their duty, and complied with their own ordinances and the laws of the Territory of Alaska, and whether they did or not cannot be used by the City of Anchorage to discharge a legal responsibility entered into in good faith by all persons.

We therefore petition this Honorable Court to reverse the judgment of the trial Court in granting a summary judgment in this case.

Dated, Anchorage, Alaska,
January 2, 1957.

Respectfully submitted,

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BURTON E. CARR and
MARIE A. CARR,
Appellants,

vs.

CITY OF ANCHORAGE,
a corporation,
Appellee.

BRIEF OF APPELLEE.

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Table of Authorities Cited

Cases

Statutes

Ordinances

Rules

Texts

No. 15,236

IN THE

United States Court of Appeals

For the Ninth Circuit

BURTON E. CARR and
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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The plaintiff filed an action in the District Court for the District of Alaska, Third Division. This complaint filed alleged in substance a contract between Burton E. Carr and the City of Anchorage, wherein the City agreed to pay the plaintiff the cost of moving a building back in order that the City might condemn certain properties for purposes of widening the street and sidewalk. Appellee is unable to ascertain from the pleadings whether or not the plaintiff below sued on an express contract. Plaintiff alleged that the City agreed and was therefore bound to pay for the

cutting of the foundation and removal of the building. The defendant answered this complaint denying that it ever made any agreement with the plaintiff as he alleged and therefore nothing was due and owing the plaintiff. A motion to dismiss was filed and then on April 12, 1956, an answer was filed. On the basis of the answer and the affidavit of Ben Boeke (TR page 12) plaintiff moved for Summary Judgment. Defendant below filed affidavit in opposition to motion for Summary Judgment. A hearing was had on the 8th day of June, 1956 and the Court entered a minute order granting Summary Judgment (TR page 18) and subsequently the City submitted a formal Summary Judgment in accordance with the minute order and the same was filed on July 6, 1956 (TR page 18). Thereafter the plaintiff appealed to this Court by giving Notice of Appeal on the 16th day of July, 1956.

ARGUMENTS AND AUTHORITIES.

ARGUMENT I.

THERE WAS NO ERROR ON THE PART OF THE DISTRICT COURT IN GRANTING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

On the basis of the affidavits, pleadings, ordinances of the City of Anchorage, statutes of the Territory of Alaska, and oral argument by counsel, the Trial Court correctly granted Summary Judgment in favor of the defendant below.

ARGUMENT II.

PLAINTIFF BELOW HAD NO VALID ENFORCEABLE CONTRACT WITH THE CITY OF ANCHORAGE.

It is the Appellee's contention that none of the necessary formalities were complied with. The City relied partly on the provision of Section 105.1 of Article II of the Anchorage General Code (Appellant's brief page 8) requiring all legal documents requiring the assent of the City to be signed by the Mayor, etc. Appellant's complaint does not allege compliance with said ordinance. The ordinance was cited as an affirmative defense (TR page 8). The language of this section is not conclusive, however, a contract is a legal document requiring the assent of the City. A contract of the nature the plaintiff claims would fall within the intent of the section.

Section 111 of the same article in the General Code, provides:

> "Section 111. Competitive Bidding. Section 111.1 No purchase of or contract for supplies, materials, services of a non-professional nature, or equipment in excess of $500.00 shall be made by any city official or employee before giving ample opportunity for competitive bidding, under such rules and regulations, and with such exceptions, as the City Manager, with Council approval, shall prescribe; such rules shall as closely as practicable follow the Territorial law on this subject (applicable only to the Territory at time of passage of this Code) contained in Chap. 4, Title 14, ACLA 1949, as amended."

The provisions of the last quoted section prohibit the making of contracts binding the City wherein the

consideration is more than $500 made with any City official or employee.

The alleged agreement with the City of Anchorage according to Appellant's complaint (TR page 4) and Appellant's affidavit (TR page 15) involved the widening of 5th Avenue in the City of Anchorage and the necessity of moving Appellant's building. As to City improvements Section 112.1 provides:

> "Section 112. Contracts for City Improvements and Public Works. 112.1. Any city improvement costing more than $1000.00 shall be executed by contract except where such improvement is authorized by the Council to be executed directly by a city department in conformity with detailed plans, specifications and estimates. All such contracts for more than $1000.00 shall be awarded to the lowest responsible bidder after public notice and competition, under such rules and regulations as the City Manager, with Council approval, shall prescribe. Rules and regulations shall as closely as practicable follow the Territorial law on this subject (applicable only to the Territory at time of passage of this Code) contained in Chapter 1, Title 14, ACLA 1949, as amended. The Council is empowered to reject all bids and advertise again or negotiate with any bidder. Alterations in any contract for more than $1000.00 may be made when authorized by the Council upon the written recommendation of the City Manager. The City may undertake city improvements and public works with its own forces."

There is no allegation in the complaint nor in the supporting affidavit of Appellant of any compliance

with this ordinance. McQuillin, Municipal Corporations, Third Edition, Revised, Volume 10, page 241, Paragraph 29.21 states in part,

> ". . . Generally, the statutes or the charter or both, more or less specifically provide how municipal contracts shall be made and executed and it is settled that the municipality can make a contract only in the manner prescribed and if not so made the contract is invalid and unenforceable."

This is supported by *Wacker-Wabash Corp. v. City of Chicago,* 350 Ill. App. 343, 112 NE 2d 903. *Adolian Bros. v. Boston,* 323 Mass. 629, 84 NE 2d 35.

Assuming for the purpose of argument that none of the above quoted ordinances is applicable to the instant case, there still remains the Territorial Statute pleaded by defendant below as an affirmative defense (TR page 9). Appellant alleged essentially an agreement with the council whereby the Appellee agreed to pay an amount of money for the cost of Appellant's cutting and moving a certain portion of his building. The statute reads:

> "All votes in the council on ordinances, resolutions and authorizations for the payment of money shall be ayes and nays and the vote of each member shall be permanently recorded in the proceedings of the council."
>
> ACLA 16-1-40 1949.

The affidavit of the City Clerk (TR page 12) indicates no record of any agreement made with Appellant, nor was there any record of any vote taken obligating the City to pay money. The statute is clear

in its requirement that all authorizations to pay money be by ayes and nays and said vote be permanently recorded. If the record does not show the taking of yea and nay, the court will not presume they were taken *(People v. Chicago and NW Railway Co.* 396 Ill. 446, 21 NE 2d 701). If such a vote were not taken the city could not become obligated. (See also McQuillin, Section 13.44, Vol. 4).

The statute quoted taken together with the ordinances of the City of Anchorage indicate certain prerequisites to the formation of a contract with the City. The reasons for these rules are obviously designed to safeguard municipalities against possible fraudulent claims and oppressive claims which are unsupported by records. City administrations are not permanent nor are their legislative bodies. To insure successful continuity records are required of what the previous council may have done. According to plaintiff below the agreement was entered into in May, 1950 (TR page 4). The complaint was filed in February of 1956. It should also be noted that there is no allegation of any previous demand for payment being made against the City in Appellant's brief. Such a delay as is indicated here makes it unduly burdensome on the municipality where later required to defend an action where it has no concrete proof of agreements, their intent and the council action thereon.

PART II.

THE AUTHORITY PUT FORWARD BY APPELLANT FAILS TO SUPPORT HIS CONTENTIONS THAT THE CITY OF ANCHORAGE IS LIABLE ON A CONTRACT TO APPELLEE.

Appellant's brief fails to comply with the rules of this Court. Appellant's brief fails to number and set out particularly each error intended to be urged (Appellant's brief page 8) as is required by the Rules of this Court (Rule 18, Section 2, Subsection (d) of the Rules of the U. S. Court of Appeals for the Ninth Circuit).

The substance of Appellant's specification of error though improperly set out is that the District Court erred in granting the motion for Summary Judgment for the reason that the plaintiff's complaint did state a cause of action against the defendant (Appellant's brief page 8). Such a specification of error is meaningless. In this case Summary Judgment was granted for the defendant below (TR page 18). The basis of the Judgment was that the pleadings and affidavits on file showed there was no genuine issue as to any material fact and the defendant Appellee was entitled to a Judgment as a matter of law (Rule 56 of the Federal Rules of Civil Procedure). Thus a complaint could state a valid claim and the defendant could still be entitled on the basis of pleadings and affidavits to Judgment as a matter of law.

The remaining portion of this part of Appellee's brief will follow as closely as possible the order of Appellant's brief.

The Appellant cites ordinances of the City of Anchorage and the laws of the Territory of Alaska,

wherein the powers of cities are enumerated (Appellant's brief page 8). The Appellee has no quarrel with these ordinances and admits the City of Anchorage acting through its council has the powers enumerated by the ordinances and statutes of the Territory of Alaska. There is no argument with the proposition that the City has the power to contract with the defendant, however, certain regular procedures must be followed.

The District Court in granting the motion for Summary Judgment (TR page 12) has decided the Appellee was entitled to Judgment as a matter of law based on the authority presented to it that there was no enforceable contract with the Appellant, taking into consideration the pleadings, affidavits and oral arguments.

Appellant cites *Femmer v. City of Juneau, et al.*, 97 Fed. 2d 652 (Appellant's brief page 12) which discusses the powers of Cities to contract where not given specific authority but are necessarily implied from the powers conferred. This argument again seems meaningless as nowhere does an argument of this nature appear. The record fails to indicate that an argument was urged that the City, Appellee, had no power to enter into this type of contract. At least nothing of this nature appears in the pleadings. The Appellee will concur in Appellant's proposition that the City had the power to enter into this type of agreement urged here, but contends that no valid contract was ever consummated.

Appellant next argues (Appellant's brief page 12) that the District Court erred in holding that the City could be held liable on a contract drawn only in accordance with Section 105 of the City ordinance. This is not a holding by the District Court and no findings of fact or conclusions of law are entered. As this ordinance was cited in Appellee's answer (TR page 8) it necessarily entered into the trial court's decision, as would the remaining affirmative defenses (TR page 9).

Appellant's brief page 14 urges that the affidavit of the City Clerk does not deny the agreement was made and urges that this was a negative pregnant. We are unable to agree with this (TR page 12). The affidavit was made for the express purpose of showing that there was no agreement nor apparently no discussion of an agreement ever recorded in the minutes of the council meeting and to show that the requisite formalities in contracting for the City were not carried out. The Appellant then discusses an affidavit made by Councilman Rozell, plaintiff's brief page 14 (TR page 16), that an agreement was made in good faith with the intention of carrying it out. It should be noted here that the affidavit of Rozell states that he was present in a meeting where Burton E. Carr appeared. It does not indicate that this was a regular meeting of the council at which a quorum was present nor does it indicate the presence of the City Clerk who was the City Clerk at the time of this alleged agreement. There is the possibility that this all took place as stated in the affidavit, yet there is no presump-

tion nor any statement to the effect that this was a regular council meeting with a quorum present to transact business in a regular manner, nor that any such agreement was ever made after a vote by the council.

Appellant discusses further the affidavits of Rozell and Carr and states that it was agreed that if Carr would cut the foundation off in front and set it back 10 feet, the City would pay the cost of moving his foundation back that far (Appellant's brief page 14). Based on the affidavit, Appellant urges that no one attempts or doubts to dispute this fact (Appellant's brief page 14). Appellee denied this allegation in its Answer (TR page 7). Defendant below then filed a motion for Summary Judgment (TR page 12) and supported it with the affidavit of B. W. Boeke, City Clerk (TR page 12). The affidavits filed by the plaintiff below were supposedly directed at the defendant's motion for Summary Judgment and the supporting affidavits; these statements of Appellant (Pages 14 and 15) are merely a restatement of Appellant's affirmative case and would not necessarily enter into the granting of Summary Judgment by this District Court (TR page 18).

Appellant next cites McQuillin Municipal Corporations, Second Edition, Revised, Volume VI, Paragraph 2652 (Appellant's brief page 15). Most of the law quoted here is general law and plaintiff will agree with the propositions stated therein. Apparently part of the statements made deal with contracts made ultra vires in some way; this doctrine is not involved in the case at issue here. It should be noted that Section

29.26, McQuillin Municipal Corporations, Volume 10, Third Edition, page 257, second paragraph, says:

> "The general rule is that if a contract is within the corporate power of a municipality but the contract is entered into without *observing mandatory legal requirements specifically regulating the mode by which it is to be exercised, there can be no recovery thereunder.*" Citing *United States. Lane-Western Co. v. Buchanan County,* 85 F. (2d) 343, 350, citing McQuillin text; *Edison Electric Co. v. Pasadena,* 178 Fed. 425.

As pointed out in the paragraph before, this rule prevails despite the propositions, ratification, estoppel or implied contracts. Appellant's brief then cites *Hitchcock v. Galveston,* 96 U. S. Reports, page 340, and urges that this case is directly in point (Appellant's brief page 17). This case is not even remotely at point with the case at bar. The facts of that case indicate a regular orderly procedure of contract wherein ordinances were passed and the Mayor was authorized and directed to enter into the contract. The contract was drawn up, ratified and approved by the City Council. The City Council there had authority to construct the sidewalks. The manner of payment was apparently not authorized by law. We certainly do not urge here that the City would not have the authority to act, but only urge that there was no contract because there was not even the bare minimum of formality as required by the ordinances and statutes of the Territory of Alaska.

Quoting headnotes from *Arkansas Valley Compress and Warehouse Company v. Morgan et al.,* 229 SW

(2d) 133, Appellant cites this as "another case directly in point" (Appellant's brief page 18). The question involved was the validity of a lease made by the City of Little Rock. The City was a defendant but prayed the relief be granted in the complaint. The City in executing the lease complied with all the legal requirements and the parties were governed by it for a period of years. The Appellate Court held there was no fraud of any species and after discussing the fact that the lease involved the City in its proprietary function found it could not cancel its lease because of inadequacy of consideration. We fail to see any connection between the law and facts of this case and the case at bar, and concur in the results of the case plaintiff below has cited.

Appellee would urge *Vito v. Town of Simsbury,* 87 Conn. 261, 87 Atlantic 722, in support of its position and it has been cited by Appellant (Appellant's brief page 19). In the case cited the defendant town voted to expend certain funds for road improvement. Pursuant to said vote selectman applied to the highway commission. Plaintiff was the successful bidder and was awarded a written contract as provided in the act and it was duly executed. The only irregularity appeared in the manner of opening of bids. The plaintiff even received certain money from the town. Plaintiff had done the work and a dispute arose as to how much was due him and whether or not defendant town was to pay for a retaining wall. Quoting from the opinion:

> "It is well settled that municipal corporations cannot be made liable on implied contracts which

> would be ultra vires if attempted to be made in express terms or which they are forbidden by statute to enter into except in a particular manner. We do not think however, that any statutory requirement has been omitted in this case, which is in the nature of a condition precedent to the creation of a contractual obligation on the part of the town."
>
> *Vito v. Town of Simsbury,* 87 Atlantic 722.

The court only said that the town could be held liable on an imperfectly executed contract (plaintiff's brief page 19). The case at bar, Appellee urges, in no way parallels case cited by Appellant, and the general law stated in the case is favorable to the Appellee's position.

Appellant quotes from McQuillin Vol. 10, page 416 Section 29.103 (Appellant's brief page 20) but fails to quote either the first part of the section or the last sentence which is:

> "If an invalid contract is one the corporation could not make, is not void because not in compliance with a mandatory provision of the law, it may be ratified."

Appellee's position is that mandatory provisions were not complied with (Appellee's brief part I).

Although there is doubt as to whether or not the doctrine of estoppel applies in the instant case even considering the section of McQuillin cited by the plaintiff below (Appellant's brief page 20), the case cited by Appellant, *Getz v. City of Harvey,* 118 Fed. 2d 817, differs materially in its facts from the case at

bar and certainly makes no holding concerning estoppel as applied to municipal corporations which would parallel this case.

It would seem that the doctrine of estoppel was correctly applied in *Quarles v. City of Appleton,* 299 Fed. 508, page 514, (cited by Appellant page 21) in view of the language,

> "We have then, no case of executory contract, no situation where plaintiff is seeking compensation for services rendered pursuant to a contract prohibited by statute or in violation of any statute. Rather, do we find a situation where a utility rightfully present in a municipality seeks to recover for services rendered with the knowledge and consent of the defendant, and without which defendant could not exist, and which services were obtainable from no other source."

As Appellee has previously stated the doctrine of estoppel does not apply in the instant case and the facts are substantially different from the case cited by the plaintiff below. The remaining cases are apparently cited to indicate the general law of estoppel (Appellant's brief page 22) which Appellant will agree with, but as the specific cases cited do not parallel the facts present in the case, further discussion of cases in estoppel would not seem worthwhile.

There is no claim by the defendant below that such a contract as indicated by the plaintiff below would be ultra vires as apparently urged by Appellant's further citation of McQuillin on Municipal Corporations, Volume 10, page 416 (Appellant's brief page

22). The second paragraph of quotation (Appellant's brief page 21) suggests a regularity of proceeding which has not been known to be present here.

Appellant then urges that nowhere does the enabling legislation require all contracts to be executed with certain formalities (Appellant's brief page 23). Plaintiff below suggests that this statute (ACLA 16-1-35 1949) gives Alaskan cities their powers. Good drafting would suggest that the formalities required for action by cities would not be within section enumerating powers given to cities. The formality required is covered by Section 16-1-40 which we have dealt with in another section of our brief (Appellee's brief page 4).

Appellee agrees with the statement of law urged by plaintiff below in the last case cited in his brief (Appellant's brief page 23). In the case *Winklebleck v. City of Portland,* 31 Pac. (2d) 637, a contract was entered into by ordinance. The city by ordinance accepted an offer made it according to the case. Nothing in the record of the case at bar supports any contention that the City accepted any offer by ordinance. The case cited is clearly distinguishable from the instant case. It should be further pointed out that neither the affidavit of Carr (TR page 15) nor Rozell (TR page 17) indicates any vote taken on an agreement or offer to pay Appellant.

CONCLUSIONS.

1. Based on the arguments of Appellee that no valid enforceable contract existed between plaintiff below and defendant below, and

2. Appellant's brief is in no way directed at the specification of error urged by him, and such specification is not properly set out,

3. The cases cited by Appellant do not controvert the law nor are they applicable to the facts supporting the motion for Summary Judgment,

It is therefore urged that the District Court made no error in granting Summary Judgment for the defendant below and the Appellee prays that the Judgment of that Court be affirmed.

Dated, Anchorage, Alaska,
February 5, 1957.

Respectfully submitted,

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